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Nos. 83-245, 83-291

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
*Appellant,*
v.
R. A. GRAY & COMPANY,
*Appellee.*

OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION TRUST FUND,
*Appellant,*
v.
R. A. GRAY & COMPANY,
*Appellee.*

**On Appeal from the United States Court of Appeals for the Ninth Circuit**

# MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEE

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**On Appeal from the United States Court of Appeals for the Ninth Circuit**

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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Comes now the United States Chamber of Commerce and moves the Court for leave to file the attached brief *amicus curiae* in this case pursuant to Supreme Court Rule 36.3. This brief *amicus curiae* is filed with the written consent of two of the three parties, Appellant Pension Benefit Guaranty Corporation and Appellee R. A. Gray & Company. The consent of Appellant Oregon-Washington Carpenters-Employers Pension Trust Fund was requested but refused.

The Chamber represents more than 200,000 business firms and individuals, many of whom are directly affected by the retroactive provisions of the Multiemployer

Pension Plan Amendments Act of 1980 ("MPPAA"). The issue before the Court in this case is whether Congress could constitutionally provide that MPPAA shall take effect on a date prior to its enactment. The constitutionality of retroactive legislation which increases the burdens on employers or substantially restructures closed contractual obligations is of prime interest to the Chamber and its members.

Appellee R. A. Gray & Company approaches the question from the perspective of the circumstances surrounding its own withdrawal from a multiemployer plan. The employers in the consolidated Ninth Circuit cases below were construction industry contractors. However, cases in other circuits have involved other industries. The issue before this Court has a much broader import as it affects employers from a variety of industries who have withdrawn for numerous reasons. The impact of the retroactive provision of MPPAA on employers in many different situations is considered in this brief.

Given the breadth of the impact of the decision and the breadth of the interests represented by this amicus, it is believed that its research and analyses will be of benefit to the Court in determining the constitutionality of the retroactive application of MPPAA. We therefore respectfully request that the Court accept and consider the attached brief amicus curiae.

Respectfully submitted,

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## TABLE OF CONTENTS


| | Page |
|---|---|
| INTEREST OF THE AMICUS CURIAE | 1 |
| PRELIMINARY STATEMENT | 2 |
| 1. Employers Affected by MPPAA's Retroactive Provisions | 4 |
| 2. The Inherent Differences Between Single Employer and Multiemployer Plans | 6 |
| 3. Background of MPPAA | 10 |
| SUMMARY OF ARGUMENT | 12 |
| ARGUMENT | 13 |
| I. RETROACTIVE APPLICATION OF MPPAA VIOLATES THE FIFTH AMENDMENT | 13 |
| A. Constitutional Standards | 13 |
| B. Retroactive Application of MPPAA Fundamentally Changes Pre-Existing Contracts by Imposing Enormous New Liabilities on Employers | 17 |
| C. Retroactive Enactment of MPPAA Does Not Rationally and Reasonably Meet the Asserted Social Purpose | 19 |
| 1. The Asserted Purpose | 19 |
| 2. Addressing the Purpose | 21 |
| 3. Moderating the Impact | 22 |
| D. *Turner Elkhorn* Does Not Require a Different Analysis or a Different Result | 24 |
| CONCLUSION | 25 |

## TABLE OF AUTHORITIES

CASES: Page

*Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) .......... 14, 15, 17, 26
*Block v. Hirsh*, 256 U.S. 135 (1921) .......... 15
*Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721 (9th Cir. 1980) .......... 20
*Connolly v. PBGC*, 581 F.2d 729 (9th Cir. 1978) .......... 9
*Coolidge v. Long*, 282 U.S. 582 (1931) .......... 16
*Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922) .......... 14
*Hazelwood Chronic & Convalescent Hospitals, Inc. v. Weinberger*, 543 F.2d 703 (9th Cir. 1976), *vacated on other grounds*, 430 U.S. 952 (1977) .......... 17
*Hinson v. NLRB*, 428 F.2d 133 (8th Cir. 1970) .......... 4, 20
*Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) .......... 15, 16
*Huge v. Long's Hauling Co., Inc.*, 590 F.2d 457 (3d Cir. 1978) .......... 20
*Labbe v. Heroman & Co.*, 521 F. Supp. 1017 (M.D. La. 1981) .......... 3
*Louisiana v. Pilsbury*, 105 U.S. 278 (1982) .......... 16
*Marcus Brown Co. v. Feldman*, 256 U.S. 170 (1921) .......... 15
*Murray v. Charleston*, 96 U.S. 432 (1878) .......... 16
*Nachman Corp. v. Pension Benefit Guaranty Corporation*, 592 F.2d 947 (7th Cir. 1979), *cert. denied on constitutional holding*, 442 U.S. 940 (1979), *aff'd on statutory holding*, 446 U.S. 359, *reh'g denied*, 448 U.S. 908 (1980) .......... 6, 7
*NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) .......... 9
*NLRB v. Carilli*, 648 F.2d 1206 (9th Cir. 1981) .......... 4
*NLRB v. Cauthorne*, 691 F.2d 1023 (D.C. Cir. 1982) .......... 4
*NLRB v. Sir James, Inc.*, 446 F.2d 570 (9th Cir. 1971) .......... 20
*Pacific Iron & Metal Co. v. Western Conference of Teamsters Pension Trust Fund*, 553 F. Supp. 523 (W.D. Wash. 1982), *appeal docketed*, No. 82-3634 (9th Cir., Nov. 18, 1982) .......... 5

TABLE OF AUTHORITIES—Continued

Page

*Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025 (N.D. Ill. 1982), *aff'd*, No. 82-2081 (7th Cir., Dec. 19, 1983) ........ 7, 10, 19

*Producers Dairy Delivery Co. v. Western Conference of Teamsters Pension Trust Fund*, 654 F.2d 625 (9th Cir. 1981) ........ 3

*Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935) ........ 13, 14, 15, 16, 17, 26

*Republic Industries, Inc., et al. v. New England Teamster & Trucking Pension Fund*, Nos. 81-2551-S, -2703-S, -2738-S (D. Mass., Aug. 3, 1983), *appeals stayed*, Nos. 83-1657, -1658 (1st Cir., Dec. 1, 1983) ........ 4, 5

*Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628 (4th Cir.), *pet. for cert. filed*, 52 U.S.L.W. 3293 (Sept. 29, 1983) (No. 83-541) ........ 4, 8

*Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, 543 F. Supp. 1234 (C.D. Cal. 1982), *aff'd*, 705 F.2d 1502 (9th Cir.), *petition for cert. filed*, 52 U.S.L.W. 3268 (Sept. 24, 1983) (No. 83-507) ........ 6, 17, 18

*Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers Int'l Union*, 566 F. Supp. 32 (W.D.N.Y.), *argued*, No. 83-7328 (2d Cir., Oct. 3, 1983) ........ 5, 18, 22, 23

*Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 549 F. Supp. 404 (S.D.N.Y. 1982), *argued*, No. 83-7004 (2d Cir., Oct. 3, 1983) ........ 5

*Transport Motor Express, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 4 EBC 1566 (N.D. Ill.), *remanded*, No. 83-2026 (7th Cir., Dec. 19, 1983) ........ 3, 4, 23

*Treigle v. Acme Homestead Ass'n*, 297 U.S. 728 (1936) ........ 14, 16

*United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) ........ 13, 14, 15, 16

*Untermyer v. Anderson*, 276 U.S. 440 (1928) ........ 16

TABLE OF AUTHORITIES—Continued

Page

*Usery v. Turner Elkhorn Mining*, 428 U.S. 1 (1976) ....7, 24, 25
*Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32 (1940) .... 14
*W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935) .... 14, 16
*W.B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934) .... 14, 16

CONSTITUTION, STATUTES AND REGULATIONS:

U.S. Constitution

Article I, Section 10 .... 13
Employee Retirement Income Security Act of 1974, *as amended by* Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1001-1461 (1976 and Supp. V 1981) ....2, *passim*
29 U.S.C. § 1002(16)(B) (1976) .... 3
§ 1301 (Supp. V 1981) .... 2
§ 1381 (1976) .... 3
§ 1381(c)(1) (1976) .... 10
§ 1382 (Supp. V 1981) .... 3
§§ 1383-1386 (Supp. V 1981) .... 2, 3
§ 1383(c) (Supp. V 1981) .... 3
§ 1391 (Supp. V 1981) .... 3
§ 1399 (Supp. V 1981) .... 3

Pub. L. No. 95-214, 91 Stat. 1501 (Dec. 19, 1977).. 10, 11
Pub. L. No. 96-24, 93 Stat. 70 (June 19, 1979).... 11
Pub. L. No. 96-239, 94 Stat. 341 (Apr. 30, 1980).... 11
Pub. L. No. 96-293, 94 Stat. 610 (June 30, 1980).... 11

OTHER AUTHORITIES

II Legislative History of the Employee Retirement Income Security Act of 1974 (1976).... 7
126 Cong. Rec. H4116 (daily ed. May 22, 1980).... 9
126 Cong. Rec. S10101 (daily ed. July 29, 1980).... 11, 21
126 Cong. Rec. S10156 (daily ed. July 29, 1980).... 11

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| Bills to Revise the Welfare and Pension Plans Disclosure Act: Hearings on H. R. 2 and H. R. 462 before the House General Subcommittee on Labor of the Committee on Education and Labor, 93d Cong., 1st Sess. 768-769 (1973) | 7, 8 |
| Pension Benefit Guaranty Corporation Multiemployer Study Required by P. L. 95-214 (July 1, 1978) | 11 |
| Pension Plan Termination Insurance for Multiemployer Pension Plans and Employee Fringe Benefits of the Committee on Finance, United States Senate, 96th Cong., 2d Sess. (1980) | 11, 12 |
| Hearing Before the Subcommittee on Oversight of the Committee on Ways and Means, House of Representatives, 96th Cong., 1st Sess. (1979) | 12 |
| Hale, *The Supreme Court and the Contract Clause*, 57 Harv. L. Rev. 852 (1954) | 15 |
| Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960) | 15 |
| Malone, *Collectively Bargained Multi-Employer Pension Plans* (1963) | 9 |

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**On Appeal from the United States Court of Appeals for the Ninth Circuit**

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## BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

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## INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States is a federation consisting of more than 4,000 state and local Chambers of Commerce and trade and professional associations as well as more than 200,000 business firms and individuals who maintain direct membership. It is the largest federation of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters before the courts, the United States Congress, the executive branch, and the independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance its members' interests over a wide spectrum of labor relations issues.

The issue before the Court is whether Congress could constitutionally provide that the Multiemployer Pension Plan Amendments Act of 1980 shall take effect on a date prior to its enactment. This issue, as we note in our motion, is of vital importance to Chamber members.

## PRELIMINARY STATEMENT

On September 26, 1980, the Multiemployer Pension Plan Amendments Act of 1980 was enacted (herein "MPPAA," 29 U.S.C. §§ 1001-1461; Appendix to Appellant PBGC's Brief, hereinafter referred to as "App.", pp. 13a-74a). MPPAA governs multiemployer pension plans to which employers are required to contribute under their collective bargaining agreements.[1] Under MPPAA, "withdrawal" from a multiemployer plan occurs if the employer " . . . ceases to have an obligation to contribute under the plan" or " 'ceases all covered operations under the plan." [2] Withdrawal from a multiemployer plan creates liability [3] in the withdrawing employer for a per-

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[1] A "multiemployer plan" is defined under the Act as a plan (a) to which more than one employer is required to contribute and (b) which is maintained pursuant to collective bargaining agreements. Section 1301, App. 25a-26a.

[2] The definition of factors determining withdrawal differs somewhat for the building and construction industry, the entertainment industry, the long and short haul trucking industry, the household goods moving industry, the public warehousing industry and the retail food industry. Sections 1383-1386, App. 35a-37a.

[3] Such liability may result from either "complete" or "partial" withdrawal. Sections 1383-1386, App. 5a-51a. Liability resulting

centage of those pension benefits to which covered employees have a nonforfeitable right, but which cannot be covered by the plans' assets.[4] When the plan's sponsor[5] determines that withdrawal has occurred, the plan sponsor calculates the amount of withdrawal liability[6] and assesses the employer involved. Generally, the date of withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations,[7] although that date often is uncertain.[8]

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from "partial" withdrawal occurs if there is a substantial decline in the employer's plan contributions or there is a partial cessation of the employer's contribution obligation. Section 1385, App. 42a.

[4] These benefits are referred to under MPPAA as unfunded vested benefits ("UVBs"). Section 1381(a), App. 33a.

[5] The "plan sponsor" of a multiemployer plan is usually a board of trustees, which establishes or maintains the plan. 29 U.S.C. § 1002(16)(B).

[6] Under MPPAA, the trustees of the multiemployer fund determine that a withdrawal has occurred, decide the amount of withdrawal liability, and set a payment schedule. Sections 1382, 1399, App. 34a, 60a. The trustees and their actuary are free to make numerous assumptions, including so-called "actuarial" assumptions concerning the future investment performance of fund assets and the number, retirement dates and life expectancies of employees having vested rights. It is these assumptions that forms the basis of the trustees' assessment of unfunded vested benefits, and consequently determines the assessment of withdrawal liability. The trustees are further free under the Act to determine which of a number of methods of calculating withdrawal liability they will employ. Section 1391, App. 35a-42a.

[7] Section 1383, App. 38a. "Cessation of covered operations" occurs, for example, when an employer closes its business, or sells the business to a party that does not continue plan contributions.

[8] For example, the date on which an employer's obligation to contribute under its collective bargaining agreement terminates is unclear in many situations, and is frequently disputed. *Transport Motor Express, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 4 EBC 1566 (N.D. Ill.), *remanded*, No. 83-2026 (7th Cir. slip op. Dec. 19, 1983); *Labbe v. Heroman & Co.*, 521 F. Supp. 1017 (M.D. La. 1981); *Producers Dairy Delivery Co. v.*

The Act's withdrawal liability provisions were made retroactive to April 29, 1980, some five months before enactment. Section 1461, App. 74a.

### 1. *Employers Affected by MPPAA's Retroactive Provisions*

Under the retroactive provisions of MPPAA, employers whose obligation to contribute to a multiemployer plan or whose operations covered by that plan ceased during the period April 29, 1980 to September 26, 1980, were assessed withdrawal liability under the Act. However, in the cited cases the pension plans continued in operation, receiving contributions from other employers and providing benefits to covered employees.

The retroactive imposition of liability upon employers withdrawing during this five-month period affected employers in a wide range of industries, and involved a variety of circumstances resulting in the cessation of the obligation to contribute to a multiemployer plan or in the cessation of covered operations under a plan. Withdrawal liability in these cases ranged as high as $19 million.[9]

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*Western Conference of Teamsters Pension Trust Fund*, 654 F.2d 625 (9th Cir. 1981); *Hinson v. NLRB*, 428 F.2d 138 (8th Cir. 1970); *NLRB v. Carilli*, 648 F.2d 1206 (9th Cir. 1981); *NLRB v. Cauthorne*, 691 F.2d 1023 (D.C. Cir. 1982).

[9] *Transport Motor Express, Inc. v. Central States, Southeast and Southwest Areas Pension Fund, supra*, note 8 (interstate common carriers; withdrawal when companies closed due to severe business losses; withdrawal liability assessed at $8.6 million, or almost three times the employers' net worth); *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628 (4th Cir.), *pet. for cert. filed*, 52 U.S.L.W. 3293 (Sept. 29, 1983) (No. 83-541) (interstate motor freight carrier; company sold because of operating losses; withdrawal liability imposed when new owner terminated all of company's operations; withdrawal liability assessed at $189,000 for closure of one operating terminal, and combined liability to all funds for all covered employees at over $19,000,000; *Republic Industries, Inc. et al. v. New England Teamster & Trucking Pension Fund*, Nos. 81-2551-S2703-S, -2738-S (D. Mass., Aug. 3, 1983), *appeals stayed*, Nos. 83-1657, -1658 (1st Cir., Dec. 1, 1983) (Arrow Transportation Co., one of the consolidated

For example, in *Pacific Iron & Metal Co. v. Western Conference of Teamsters Pension Trust Fund*,[10] withdrawal occurred when employees voted out the union as their bargaining representative. In numerous other cases, withdrawal occurred when businesses failed or were sold due to business losses. In *Republic Industries, Inc. et al. v. New England Teamsters & Trucking Pension Fund*,[11] one of the consolidated defendants was a heavy equipment and railroad car unloader whose business property was annexed by the City of Cambridge, Mass. Unable to find another suitable location, the employer terminated its business and sold its personal property. Withdrawal liability was assessed at $468,637. In *Sibley, Lindsay & Curr Co. v. Bakery, Confectionary & Tobacco Workers Int'l Union*[12], the employer, due to financial losses, closed a bakery within one of its department stores. Prior to closing, the employer Sibley and the union entered an agreement "governing their obligations . . . with regard to the closing of the [bakery] operation", under which Sibley provided vacation and severance benefits to terminated employees. Nevertheless, Sibley was assessed withdrawal liability at $315,927.

The construction contractors in the consolidated Ninth Circuit cases below are typical of employers snared by

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defendants, a motor common carrier; withdrawal when business was terminated because of unprofitable operations; withdrawal liability assessed at $965,534); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 549 F. Supp. 404 (S.D.N.Y. 1982), *argued*, No. 83-7004 (2d Cir., Oct. 3, 1983) (processor and distributor of dye and textile materials; withdrawal occurred when company ceased operations and liquidated assets due to continuing business decline; withdrawal liability assessed at nearly $1 million).

[10] 553 F. Supp. 523 (W.D. Wash. 1982), *appeal docketed*, No. 82-3634 (9th Cir. Nov. 18, 1982) (withdrawal liability assessed at $84,830).

[11] *Supra*, note 9.

[12] 566 F. Supp. 32 (W.D.N.Y.), *argued*, No. 83-7328 (2d Cir., Oct 3, 1983).

the retroactive withdrawal provision when they were unable to negotiate new labor contracts with the union.[13] These agreements required contributions to pension trust funds. The Shelter Framing and G & R Roofing agreements terminated by their terms on July 1, 1980. When negotiations reached an impasse the obligations of the employers to make contributions to the pension trusts ceased. 705 F.2d at 1506. Similarly, the R. A. Gray agreement was not renewed when it expired on May 31, 1980. A strike failed to produce an agreement (Joint Appendix, p. 13). On July 24, 1981 the fund trustees notified Gray that it had withdrawn from the multiemployer plan as of June 1, 1980. Following the cessation of obligations to contribute, the pension plan trustees assessed liability against R. A. Gray ($201,359), Shelter Framing ($727,648) and G & R Roofing ($687,387). 705 F.2d 1506-07. In Shelter Framing's case, the withdrawal liability exceeded 180 percent of the total stockholder equity in the corporation. 705 F.2d at 1506.

### 2. *The Inherent Differences Between Single Employer And Multiemployer Plans*

Any assessment of MPPAA's impact starts with the employer's contractual obligations and responsibilities to the multiemployer plan. Reliance on analysis involving single employer plans is inappropriate.

Under a single employer plan, in addition to promising to fund the plan, the employer promises payment of specific pension benefits to its own employees.[14] The em-

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[13] *Shelter Framing Corp. v. Carpenter's Pension Trust for Southern California*, 543 F. Supp. 1234 (C.D. Cal. 1982), *aff'd*, 705 F.2d 1502 (9th Cir.), *petition for cert. filed*, 52 U.S.L.W. 3268 (Sept. 24, 1983) (No. 83-507).

[14] The court recognized this direct promise of benefits to employees in *Nachman Corp. v. PBGC*, 592 F.2d 947 (7th Cir. 1979), *cert. denied on constitutional holding*, 442 U.S. 940 (1979) *aff'd on statutory holding*, 446 U.S. 359 (1980), when it held that a liability exclusion clause in the Pension Agreement could not relieve it of its

ployer designs and structures the plan, sets benefit levels and directly controls the investment and management of fund assets. Prior to ERISA, as informed commentators have noted:

> Most single employer plans call for a specific benefit amount payable at retirement but do not specify a required employer contribution. They are generally administered by the employer and the employer generally has the right to terminate the plan at any time with no further liability for pension contributions.[15]

Congress enacted Title IV of ERISA for the specific purpose of guaranteeing vested benefits previously lost upon plan termination.[16] Thus, ERISA's plan termination guarantee provisions enforced—prospectively—a single employer's contractual promise to provide specified pension benefits to its own employees.[17]

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obligation to pay vested benefits upon plan termination. As the *Peick* court pointed out, "in relying upon its liability disclaimer clause [to argue unconstitutional impairment of contract rights], Nachman had relied upon nothing more than an asserted right to break the 'true' deal it had struck with its employees." *Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025 (N.D. Ill. 1982), *aff'd*, No. 82-2081 (7th Cir., Dec. 19, 1983).

[15] Bills to Revise the Welfare and Pension Plans Disclosure Act: Hearings on H.R. 2 and H.R. 462 before the House General Subcommittee on Labor of the Committee on Education and Labor, 93d Cong., 1st Sess. 768-769 (1973), Testimony of John B. Hall, Deputy Assistant Secretary for Tax Policy, Department of Treasury.

[16] *Nachman, supra*, note 13. Congress expressly recognized the need to make employers liable for pension benefits promised to their employees, noting that "it is unconscionable that an employer is presently under no legal obligation to make good on his pension promise," II Legislative History of the Employee Retirement Income Security Act of 1974, at p. 3479 (1976).

[17] In the single employer context, Title IV of ERISA, like the Black Lung Act at issue in *Usery v. Turner Elkhorn Mining*, 428 U.S. 1 (1976), was in fact a rational measure to spread the cost of the employee benefits to those who had profited directly from the fruits of the employee's labor.

With respect to multiemployer plans, the courts below and commentators have noted:

> [They] have significantly different characteristics. They generally require a specific employer contribution. They generally are administered by a joint employer-union board of trustees which has the authority to set benefits. The employer's obligation is generally limited to making the specific contribution and a participating employer cannot terminate the plan although he may withdraw from it.[18]
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> * * *
>
> . . . [M]ultiemployer funds predominate in industries typified by small employers, shifting work forces and work places and portability of employment . . . . The multiemployer character of the fund permits employees to accumulate pension credits even while shifting employment from one employer to another, and protects their pension rights from being lost by the 'withdrawal' of any particular employer. The multiemployer character of the fund also protects the solvency of the fund because the impact on the fund from the 'withdrawal' of any particular employer is minimized; and when new entrants take the place of withdrawing employers, the pool is replenished.[19]

Thus, as collective bargaining agreements are created and terminated, as employers come and go within an industry, and as the work shifts from employer to employer, a multiemployer fund receives contributions from employers currently required under their union contracts and maintains promised benefit levels for employees who remain in "covered employment." While contributions from one employer may decrease, the contributions[20]

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[18] Hall testimony, note 15, *supra*.

[19] *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, n. 1 (4th Cir. 1983).

[20] "The same contribution rate is required of each employer without reference to the cost factors of his own employee group. As a

from another employer may increase, and vested benefit rights of individual employees, irrespective of who employed them, are protected through the fund's investment and management of the monies collected from its employer contributors.[21]

Unlike the employer maintaining its own plan, an employer contributing to a multiemployer plan has little, if any, control over the relationship between contribution levels and promised benefits, the management of pension funds, the setting of benefit levels, or the subsequent financial ability of the fund to provide these benefits. These decisions are made by plan trustees, and while multiemployer plans include employer trustees, those trustees are legally bound to jointly act only as fiduciaries for covered employees, and are expressly prohibited from representing their own business interests. *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981).

Under Title IV of ERISA, the employer that withdrew from a multiemployer plan sustained potential liability for a share of unfunded nonforfeitable benefits guaranteed by the PBGC only if that plan terminated within five years after withdrawal. Even then, that liability was contingent on the PBGC exercising its discretionary authority to guarantee benefits of the terminated plan and

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result, some employers may pay more and others less than their share of the cost of benefits for their own employees . . .

[T]he Union is the cohesive force demanding that employers accept the plan's average experience in lieu of their own costs and offering a limitation of contribution liability as a *quid pro quo*." J. Malone, *Collectively Bargained Multi-Employer Pension Plans*, 95-96 (1963).

[21] Congress recognized that this multiemployer system of protecting pension benefits was more stable than single employer plans, which was one of the main reasons it declined to require mandatory PBGC guarantees for multiemployer plans when ERISA was enacted. 126 Cong. Rec. H4116 (daily ed. May 22, 1980) (remarks of Rep. Biaggi). *See also, Connolly v. PBGC*, 581 F.2d 729, 734 (9th Cir. 1978).

to seek recovery against that employer. Recovery was limited to the amount of benefits guaranteed by the PBGC and to thirty percent of the employer's net worth.

Under MPPAA, a withdrawing employer's liability is based on the proportion of its contributions over the five years prior to withdrawal relative to all contributions received by the fund during the same period.[22] Under this formula, there is no direct relationship between an employer's level of contributions and the amount of vested benefits for its own employees.[23] When the employer's obligation to contribute ceases, or when it ceases covered operations, it becomes absolutely liable for a proportionate share of the plan's unfunded vested benefits without regard to the possibility of plan termination, the plan's financial needs or the amount of vested benefits, if any, of its own employees.

### 3. *Background of MPPAA*

Under Section 1381(c)(1) of ERISA, mandatory PBGC guarantees for benefits payable upon multiemployer plan terminations were to become effective January 1, 1978. In 1977, Congress delayed implementation of the January 1 effective date and ordered the PBGC to investigate alternatives for multiemployer plans.[24] This effective date for the mandatory guarantee program was delayed three more times while Congress decided how to protect multiemployer plans.[25] While the PBGC alleged

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[22] This is the "presumptive" method. Section 1391(b), App. 53a-66a.

[23] Where employees have relatively little seniority and few or no past service credits, they would be entitled to a much smaller proportion, if any, of a fund's unfunded vested benefits than is reflected in their employer's proportionate level-of-contributions liability.

[24] *See Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025, 1030-31 (N.D. Ill. 1982), *aff'd*, No. 82-2081 (7th Cir. Dec. 19, 1983).

[25] The effective date for mandatory coverage of multiemployer plans was extended four times: to June 30, 1979 (Pub. L. No. 95-

that the possibility of employer withdrawals and plan terminations was a "key problem" of ongoing multiemployer plans,[26] no Congressional efforts were made to provide protections for multiemployer plans beyond the PBGC discretionary insurance program, or to deter employers from withdrawing from plans in anticipation of eventual legislation.

On May 3, 1979, almost two years after Congress commissioned the PBGC investigation of multiemployer plans, an administration bill was submitted to Congress containing the PBGC's legislative recommendations and proposing an effective date of February 27, 1979—the date the PBGC recommendations had been submitted.[27]

During the year that followed submission of this bill employers who would have been "caught" by the proposed retroactive effective date [28] vigorously lobbied Congress to move that date forward, arguing that the original effec-

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214, 91 Stat. 1501 (Dec. 19, 1977); to May 1, 1980 (Pub. L. No. 96-24, 93 Stat. 70 (June 19, 1979), to July 1, 1980 (Pub. L. No. 96-239, 94 Stat. 341 (Apr. 30, 1980), and to August 1, 1980 (Pub. L. No. 96-293, 94 Stat. 610 (June 30, 1980), before mandatory coverage was finally superseded by the MPPAA. At no time during this period were steps taken to deter the possibility of employer withdrawals prior to the eventual implementation of mandatory coverage or the statutory scheme ultimately embodied in MPPAA.

[26] See Pension Plan Termination Issues: Hearing Before the Subcommittee on Oversight of the House Committee on Ways and Means, 95th Cong., 2d Sess. 22 (1978). The PBGC argued that the 30% net worth limitation enabled employers to "take advantage" of the single employer insurance system, relying on PBGC guarantees of benefits while limiting their own potential liability if a plan terminated. Pension Benefit Guaranty Corporation, Multiemployer Study Required by Pub. L. 95-214 (July 1, 1978).

[27] The threat of retroactivity was considered necessary by one member of Congress to deter "opportunistic" withdrawals while the legislation was under consideration. 126 Cong. Rec. 10156 (daily ed. July 29, 1980) (Sen. Matsunaga).

[28] 126 Cong. Rec. S10101 (daily ed. July 29, 1980) (Sen. Javits).

tive date was unfair to employers that had "acted in complete good faith on the basis of the law and general public knowledge at the time." [29] Congress accepted these arguments and ultimately the Senate on July 29, 1980 adopted the bill with an April 29, 1980 effective date for withdrawal liability.

## SUMMARY OF ARGUMENT

Due Process requires that retroactive pension benefit legislation serve an important public purpose, that its impairment of private contracts must be reasonable, and that the impairing legislation be reasonably related to fulfillment of the public purpose to be served.

Retroactive enactment of MPPAA unreasonably imposes a dramatic change in contractual obligations upon employers who must be able to rely on existing law in closing transactions. The "withdrawing" employers were denied opportunities available to employers withdrawing after enactment to select options to protect against staggering potential liabilities. This retroactive liability neither meets any asserted Congressional purpose, nor is it narrowly drawn to accomplish the asserted purpose of deterring "opportunistic" withdrawals. This arbitrary and overreaching alteration of closed contractual obligations imposes upon these employers a burden so harsh and oppressive that it cannot withstand scrutiny under the Due Process Clause of the Constitution.

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[29] Pension Plan Termination Insurance for Multiemployer Pension Plans, Hearing Before the Subcommittee on Private Pension Plans and Employee Fringe Benefits of the Committee on Finance, United States Senate, 96th Cong., 2d Sess. at 173 (1980). *See also*, Hearing Before the Subcommittee on Oversight of the Committee on Ways and Means, House of Representatives, 96th Cong., 1st Sess. at 111 (1979).

## ARGUMENT

### I. RETROACTIVE APPLICATION OF THE MPPAA VIOLATES THE FIFTH AMENDMENT

#### A. Constitutional Standards

The Due Process Clause of the Fifth Amendment restricts enactment of retroactive legislation if it is "harsh and oppressive." [30] In order to withstand constitutional scrutiny, this Court has stated that retroactive pension benefit legislation must serve an important public interest, the impairment of private contracts must be reasonable and the impairing legislation must be reasonably related to fulfillment of the public interest sought to be served. *Railroad Retirement Board v. Alton R.R.*, 295 U.S. 330 (1935).

In *Alton*, this Court examined the constitutionality of the retroactive feature of the Railroad Retirement Act of 1934, which required employers to pay pensions to individuals whose employment had ended prior to enactment. The Court unanimously held that retroactive application of that Act was contrary to the Fifth Amendment Due Process Clause.

In reaching this conclusion, the Court examined the effect of retroactivity on pre-existing contractual rights:

> Plainly this requirement alters contractual rights; plainly it imposes for the future a burden never contemplated by either party when the earlier relation existed or when it was terminated. The statute would take from the railroads' future earnings amounts to be paid for services fully compensated when rendered in accordance with contract, with no thought on the part of either employer or employee that further sums must be provided by the carrier.

[30] *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n. 13 (1977), quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938).

* * * [I]t resurrects new burdens for transactions long since passed and closed.[31]

The proponents of the statute claimed retroactive application was adopted "to assure those on furlough, or temporarily relieved from duty subject to call, the benefit of past years of service . . . and to prevent the carriers from escaping their just obligations by omitting to recall these persons to service." [32] They further argued that retroactive application would promote efficiency or safety in the future operation of the railroads.[33] The Court rejected these arguments and found that these purposes did not outweigh the "onerous financial burden" placed on employers and that retroactivity was not reasonably aimed at serving the asserted purposes.[34]

The Court has followed this analysis [35] of retroactive legislation as recently as 1978, when, in *Allied Structural Steel*,[36] it sustained a challenge to the constitutionality of

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[31] 295 U.S. at 349-350. This application to former employees included employees who had been discharged for cause or otherwise unfaithful to the employer.

[32] *Id.* at 348.

[33] *Id.*

[34] *Id.* at 350.

[35] This analysis was also applied in the following cases: *United States Trust Co. v. New Jersey, supra*, note 30; *Treigle v. Acme Homestead Ass'n*, 297 U.S. 728 (1936); *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935); *W.B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934); *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922).

[36] *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 262, n. 9 and 241 n. 12 (1978). Several cases have indicated that the standard under the Contract Clause, Article I, Section 10, of the Constitution, is the same as that utilized in determining the validity of retrospective legislation under the Due Process Clause of the Fifth Amendment. *See e.g., Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32 (1940). "Although there is no clause expressly forbidding the federal government to pass laws impairing the obligation of

Minnesota's Private Pension Benefits Protection Act. In doing so, the Court first examined the impact on contractual relationships:

> The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law and the parties are entitled to rely on them.[37]

This Court found the Act impacted a "basic term" of the pension contract: the funding of a pension plan, "an area where the element of reliance was vital." [38]

Following the *Alton* analysis, this Court then held the severity of the impairment on private contracts measures the "height of the hurdle the state legislation must

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contracts, any federal law impairing them in a manner which the Supreme Court deemed unreasonable would doubtless be held to a deprivation of property without due process." Hale, *The Supreme Court and the Contract Clause*, 57 Harv. L. Rev. 852, 890-91, n. 18 (1944). In any event, fairness dictates application of Contract Clause principles where a retroactive statute radically rewrites closed contractual arrangements, resulting from good faith bargaining, on which the parties have justifiably relied. Certainly, no rationale would justify a divergent standard for federal legislation. *See also, Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, 373 (1935); *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 26 n. 25; *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 448 (1934); Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 695 (1960); *Marcus Brown Co. v. Feldman*, 256 U.S. 170 (1921); *Block v. Hirsh*, 256 U.S. 135 (1921). Constitutional standards for analysis of retroactive legislation have developed along substantially identical paths for both Due Process and Contract Clause challenges.

[37] 438 U.S. at 245.

[38] *Id.* at 246.

clear."[39] The impairment being severe, the Court concluded, "[L]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption."[40] After determining that the "severe disruption of contractual expectations" was not justified by an "important general social problem",[41] the Court concluded the retroactive vesting feature of the Act was unconstitutional.[42]

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[39] *Id.* at 244-45.

[40] *Id.* at 244, *citing, United States Trust Co. v. New Jersey*, 431 U.S. 1, 22. These considerations developed from a series of cases that arose from the efforts of states to deal with unusual economic emergencies resulting from the depression of the 1930s. *See Home Building & Loan Ass'n v. Blaisdell, supra*, note 36; *W. B. Worthen Co. v. Thomas, supra*, note 35 (retroactive law was held invalid since it was not precisely and reasonably designed to meet a "grave temporary emergency" in the interest of the general welfare); *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935) (Arkansas law that limited the rights and remedies of mortgage bondholders was found unconstitutional because the Act was not narrowly aimed at the problem); *Treigle v. Acme Homestead Ass'n, supra*, note 35 (Act's interference with contract rights was not justified by alleged public interests). *See also, Louisiana v. Pilsbury*, 105 U.S. 278 (1882); *Murray v. Charleston*, 96 U.S. 432 (1878).

[41] 438 U.S. at 247. The proponents of the Act argued the Act was an effort to cure an alleged gross unfairness in the private handling of employees' pension funds. 438 U.S. at 252.

[42] In *United States Trust Co. v. New Jersey, supra*, note 30, this Court applied the same principles to hold invalid a New Jersey statute which repealed an earlier statutory covenant to Port Authority bondholders that had limited the ability of the Port Authority to subsidize rail passenger transportation from its revenue and reserves. A narrow exception to the constitutional proscription of retroactive legislation exists for income tax legislation. This is permitted because income taxes are "a way of apportioning the cost of government." *Welch v. Henry*, 305 U.S. 134, 146 (1938). Even in the tax area this Court has held that retroactive legislation may not be imposed constitutionally if it is significantly different from prior taxes. *See e.g., Coolidge v. Long*, 282 U.S. 582 (1931); *Untermyer v. Anderson*, 276 U.S. 440 (1928).

For the reasons set forth below, we respectfully submit retroactive application of MPPAA is contrary to *Alton*, *Allied Structural Steel* and the other Supreme Court cases evaluating the constitutionality of retroactively applied legislation.[43]

**B. Retroactive Application of MPPAA Fundamentally Changes Pre-Existing Contracts by Imposing Enormous New Liabilities on Employers**

The retroactive application of MPPAA shares with *Alton* and *Allied Structural Steel* a harsh burden imposed upon employers for completed transactions. The retroactive affects were so "wholly unexpected and disruptive that harsh and oppressive consequences followed." [44] The effect of MPPAA on the contractual obligation was not only severe, but was far beyond any reasonable expectations of those employers given the nature of the contract and statutory obligations existing at that time. As discussed previously, the impact on individual employers has been devastating.[45] Many employers who withdrew between April and September of 1980 did so because they were unable to reach agreement on renewal of collective bargaining agreements, because their businesses failed or were sold due to operating losses, or because employees voted to change their bargaining repre-

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[43] The majority of circuits that have addressed the constitutionality of federal pension legislation has followed the approach utilized in *Alton* and *Allied Structural Steel. See Nachman, supra* note 14; *Republic Industries, supra* note 9; *Shelter Framing Corp., supra* note 13. Even the Seventh Circuit in *Peick* recognized that "there is no question that certain principles which have developed under the contract clause are applicable in due process analysis . . ." *supra*, note 24, slip op. at p. 29.

[44] *Shelter Framing*, 705 F.2d at 1510, *citing Hazelwood Chronic & Convalescent Hospitals, Inc. v. Weinberger*, 543 F.2d 703, 708 (9th Cir. 1976), *vacated on other grounds*, 430 U.S. 952 (1977).

[45] *See* Preliminary Statement pp. 4-6 for examples of the impact of retroactive liability upon employers.

sentative.[46] These employers now are required, after withdrawal occurred, to pay sums that seriously threaten their solvency.

This severe impairment is not diminished by the pendency of proposed legislation. Employers cannot be charged with the responsibility of predicting congressional action. "Forecasting congressional action is akin to forecasting the weather or the stock market: There are simply too many unpredictable variables involved." [47] This is particularly true of the turbulent and highly political history that preceded enactment of MPPAA.

Prior federal regulation of pension plans could not put employers on reasonable notice that drastic changes in their liability for a fund's unfunded benefits would attach before the new law was adopted.[48]

As we noted, under ERISA, potential liability beyond that created by the collective bargaining agreements existed only in the event the plan terminated within five years of withdrawal and the potential liability was limited to 30% of the employer's net worth.

Thus, under MPPAA's retroactive provisions, affected employers are converted from promisors of specific contributions under collective bargaining agreements to absolute insurers for the overall pension benefits promised

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[46] *See supra* notes 9 and 10.

[47] *Sibley, Lindsay & Curr Co. v. Bakery, Confectionery and Tobacco Workers, supra*, note 12: "No one should be held reasonably to anticipate a given type of congressional action on any subject. Outside the tax area, there is no authority that imposes on anyone the burden of predicting congressional action." 566 F. Supp. 32, 36, *quoting Shelter Framing*, 543 F. Supp. 1234, 1249 (D.C. Cal. 1982).

[48] Prior federal labor-management legislation, including regulation of jointly-administered funds and reporting and filing requirements, did not address or affect substantive pension contractual obligations, but merely imposed procedural or technical requirements.

by the pension plan without regard to the plan's actual financial stability.[49]

### C. Retroactive Enactment of MPPAA Does Not Rationally And Reasonably Meet The Asserted Social Purpose

#### 1. *The Asserted Purpose*

Because of this unforeseen impact on contractual rights and closed transactions, MPPAA can only withstand constitutional scrutiny if it is narrowly drawn to meet an important public purpose.[50] MPPAA cannot withstand that attack.

The PBGC's fear of massive pre-enactment withdrawals was unjustfied. The lynchpin of the PBGC's "rationality" argument is that the employer has complete control over the circumstances and timing of withdrawal. The statutory determinative factors and the facts in the cases below show just the opposite. Indeed, other federal statutory law regulating labor-management relations bars "hasty" bad faith withdrawals.[51]

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[49] In *Peick*, the Seventh Circuit attempted to distinguish the MPPAA cases from *Allied Structural Steel*: "In *Allied Steel*, the Court invalidated a Minnesota statute which imposed liability on employers for the payment of unfunded benefits, *vested by operation of law*, upon the termination of a private pension plan. In *Nachman* and the case before us, the liability imposed on employers is based upon *contractually* vested pension benefits." *Peick, supra*, note 14, slip op. at pp. 44-45. However, as our analysis demonstrates, the multiemployer plan, not the individual employers, make contractual promises of vested benefits to employees. The employers only promised to pay specific contributions under collective bargaining agreements during the term of those agreements.

[50] *Allied Structural Steel*, 438 U.S. at 245. *See Nachman Corp. v. PBGC*, 592 F.2d 947 (7th Cir. 1979).

[51] In fact, there is nothing in the legislative history of MPPAA establishing the need for a five-month retroactive period. On the contrary, Congress repeatedly *deferred* the effective date for mandatory guarantees, until it could fashion a system of guarantees that would be financially feasible. *See Peick*, 539 F. Supp. at 1032-1033.

Unlike an employer contributing to its own single employer plan, an employer contributing to a multiemployer plan is bound by the terms of its collective bargaining agreement to make plan contributions during the term of that agreement.[52] Even when the agreement expires, the employer is bound under the National Labor Relations Act ("NLRA") to engage in good faith bargaining and to continue pension contributions. The employer cannot unilaterally withdraw until impasse is reached.[53] The restrictions under the NLRA thus create major obstacles to any precipitous, unilateral, bad faith employer withdrawals.

As the cases challenging retroactivity demonstrate, the timing of most withdrawals under MPPAA is the product of circumstances beyond the control of the employer. Since employer participation in multiemployer plans is by statutory definition the product of collective bargaining, these extrinsic factors created by the union-employer relationship are the primary determinants of when withdrawal occurs under the Act. Thus, the imposition of withdrawal liability retroactively upon individual employers is an improper solution to ostensible concern for massive plan terminations. If Congress was, in fact, concerned that massive opportunistic withdrawals would in fact cause plans to terminate, it surely would not have repeatedly deferred the effective date for mandatory guarantees, thereby increasing the opportunity for withdrawal.[54]

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[52] *See e.g., Huge v. Long's Hauling Co., Inc.*, 590 F.2d 457 (3d Cir. 1978).

[53] By virtue of Sections 8(a)(5) and 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) and (d), the obligation to contribute to fringe benefit funds survives the expiration of the collective bargaining agreement and the employer may not make unilateral changes until an impasse in bargaining is reached. *Hinson v. NLRB*, 428 F.2d 133, 137 (8th Cir. 1970); *NLRB v. Sir James, Inc.*, 446 F.2d 570 (9th Cir. 1971); *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 729 (9th Cir. 1980).

[54] There is no evidence that massive pre-enactment withdrawals occurred. Over 70 employers who withdrew from plans between

As noted, the effective date of MPPAA was pushed forward from February 27, 1979 to April 29, 1980, to benefit employers who would have been "caught" by the original effective date. 126 Cong. Rec. S.10101 (daily ed. July 29, 1980) (Sen. Javits). Those employers convinced Congress that they should be protected from withdrawal liability because they had acted in "good faith" on the basis of the state of the law and general public knowledge at the time.

The only conclusion to be drawn from Congress' deferral of the retroactive date is that it had no real cause to impose retroactive liability on employers.[55]

2. *Addressing the Purpose*

If retroactivity was aimed only at those employers who illegitimately tried to escape the multiemployer fund, the legislation was not limited, as required, to meet that narrow concern. Under the Due Process Clause, Congress is not free to impose a drastic impairment when an evident and more moderate course would serve its purpose equally well.

MPPAA makes no effort to distinguish between "good faith" and "bad faith" withdrawals occurring between April 29 and September 26. Instead, it adopted an arbitrary retroactive date that protected some employers

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April 29, 1980, and September 26, 1980, have sued challenging the constitutionality of the retroactive provisions of MPPAA. With over 2000 multiemployer plans covering thousands of employees in the United States, the potential impact of these withdrawals on the multiemployer plan system is clearly miniscule. Yet, while this number represents a tiny fraction of all employers contributing to multiemployer plans, the collective liability assessed against these employers is $64,609,110—representing an *average* liability of close to one million dollars.

[55] One member concluded that "the original purpose of a retroactive date—namely to avoid encouragement of employer withdrawals while the bill was being considered—ha[d] been achieved." 126 Cong. Rec. S10101 (daily ed. July 29, 1980) (Sen. Javits).

while indiscriminately punishing other employers who, with similar good faith reliance on the law at the time, withdrew after April 29 and before the MPPAA was actually passed.[56] In view of Congress' recognition that withdrawals could well occur in good faith, this overbroad and indiscriminate punishment of those employers cannot stand the Constitutional test.

Because employers contributing to multiemployer plans have little or no control over the timing of most "events of withdrawal," the retroactive application of the Act imposed an arbitrary and irrational punishment on employers whose obligations—due to the timing of union elections, bargaining negotiations, contract termination, or severe business decline—ceased between April 29 and September 26, 1980.

### 3. *Moderating the Impact*

Employers facing potential withdrawal liability after enactment of MPPAA on September 26, 1980, were afforded alternatives under the new Act. Under Section 1405, withdrawal liability is limited under circumstances where an employer engages in a bona fide sale of all or substantially all of its assets in an arms length transaction to an unrelated party; or where an insolvent employer undergoes liquidation or dissolution.[57] As the court noted in *Sibley*:

> The company had several options had it known that substantial withdrawal liability was going to be imposed. [The employer] could have chosen to continue operating [the company], or sold [the company's]

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**[56] There can be no difference between employers who withdrew for good faith reasons after February 27, 1979 and those who withdrew for good faith reasons after April 29 with respect to the asserted purposes of retroactivity "to avoid encouragement of employer withdrawals while the bill was being considered." *Supra*, note 55.**

**[57] App. 68a.**

> assets to a company which participated in the plan and intended to remain in business. Alternatively, [the employer] could have withdrawn partially from the fund and reduced its withdrawal liability. 29 U.S.C. § 1386.

566 F. Supp. at 36.

For an employer who withdrew between April 29, 1980 and September 26, 1980, there was no opportunity safely to avail itself of the moderating provision ultimately available under the Act.[58]

An employer faced with declining business in the summer of 1980 could not have known that by selling to a successor employer who maintained contribution to its plan, or by going out of business altogether, the withdrawing employer could avoid or mitigate the potentially ruinous liability that would later be assessed against it. Similarly, an employer whose collective bargaining agreement had expired and who was engaged in negotiation of a new contract during the summer of 1980 might well have re-evaluated its negotiating position had it known that a unilateral change following bargaining to impasse would result in staggering withdrawal liability.[59]

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[58] MPPAA does not contain three significant moderating provisions of ERISA: the contingent nature of the liability, the cap on payments placed at thirty percent of an employer's net worth, and the calculation of liability based on only the amount guaranteed by the PBGC, not the full value of the employees' vested benefits. Under MPPAA, there are no such significant features to moderate the imposition of large withdrawal liability.

[59] Shelter Framing's liability, created after bargaining to impasse with the union, was assessed at over twice the corporation's net worth. 705 F.2d at 1506, n. 5. In *Transport Motor Express v. Central States, Southeast and Southeast Areas Pension Fund*, No. 83-2026 in the U.S. Court of Appeals for the 7th Circuit, plaintiffs closed down their business in the face of severe losses. Several months later, after MPPAA was enacted, withdrawal liability was assessed against the companies at over $8.6 million—nearly three times their combined net worth.

### D. *Turner Elkhorn* Does Not Require a Different Analysis or a Different Result

Since the underlying standards for Due Process and Contract Clause analysis have developed along substantially identical paths, and no rationale justifies a divergent analysis for federal legislation,[60] the Ninth Circuit focused on proper considerations. While the Contract Clause itself does not apply to federal legislation, the assertion of a vague "rationality" standard, without regard to the statute's impact and purpose, truncates any meaningful Due Process protection. Yet this protection is particularly important in the pension obligation area. In completing transactions there, an employer must be able to rely on existing law and existing contractual obligations.

This Court's decision in *Turner Elkhorn*[61] does not require a different result. While this Court sustained a statute which required mine operators to provide compensation to former employees who had contracted black lung disease during their employment in the operator's mines, the burden placed on employers was insignificant compared to the effects of black lung disease, a progressive, irreversible disease directly *resulting from* unhealthy mining conditions. The mine operators had "clearly been aware of the danger" of exposure to mining conditions.[62] Conversely, the financial stability or instability of multi-employer pension funds is by no stretch of the imagination a direct result of individual employers withdrawing from the plan. While the Act in *Elkhorn* was designed to allocate to the employer an actual, measurable cost of its business, MPPAA retroactively requires an employer to supplement a fund over which it has no control and in

[60] *See supra*, note 36.

[61] *Usery v. Turner Elkhorn Mining*, 428 U.S. 1 (1976). *See supra*, note 17.

[62] *Id.* at 17.

an amount that far exceeds bargained-for contributions. As we have shown, retroactive liability to multiemployer plans simply bears no relationship to the liabilities created by an individual employer's limited contractual obligation.

Moreover, the *Elkhorn* statute contained moderating features. For a substantial period following enactment, companies were free to leave the industry and avoid liability altogether,[63] and the government was responsible for a large portion of the costs.[64] Such considerations do not exist here.

In *Elkhorn*, this Court distinguished the statute there from retroactive pension legislation in *Alton*:

> The point of black lung benefit provisions is not simply to increase or supplement a former employee's salary to meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employees labored to allocate to the mine operator an actual, measurable cost of his business.[65]

Here the analysis of *Alton* and *Allied Structural Steel* governs. Because retroactive enactment of MPPAA cannot meet the Due Process standards of the pension benefit cases, as the Ninth Circuit found below, it must be held unconstitutional.

## CONCLUSION

Retroactive enactment of MPPAA has effected a substantial impairment of contract expectations. It was neither reasonable nor necessary to serve any vital public purpose. If a public purpose did exist, less drastic means of meeting that purpose were available. This is precisely

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[63] *Id.* at 9.

[64] *Id.* at 9-10.

[65] *Id.* at 19.

the situation that the Due Process Clause was designed to prevent.

Accordingly, retroactive application of MPPAA should be found to be unconstitutional.

Respectfully submitted,

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